

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

FULL ED

November 24, 1997

| | | |
|--------------------------------|---|-----------------------|
| SCOTTY DOYLE CHISM, |) | Cecil Crowson, Jr. |
| Plaintiff/Appellant, |) | Appellate Court Clerk |
| |) | SHELBY COUNTY |
| VS. |) | HON. D.J. ALISSANDROS |
| |) | CHANCELLOR |
| URBAN RETAIL MANAGEMENT |) | |
| COMPANY, d/b/a MALL OF MEMPHIS |) | No. 02S01-9705-CH- |
| 00040 | | |
| and HOME INSURANCE COMPANY, |) | |
| |) | |
| Defendants/Appellees. |) | |

FOR APPELLANT:

Steven G. Roberts
6263 Poplar Avenue
Suite 1032
Memphis, TN 38119

FOR APPELLEE:

Carroll C. Johnson, III
1698 Monroe Avenue
Memphis, TN 38104

MEMORANDUM OPINION

MEMBERS OF PANEL:

JANICE M. HOLDER, JUSTICE
HEWLITT P. TOMLIN, JR., SENIOR JUDGE
CORNELIA A. CLARK, SPECIAL JUDGE

AFFIRMED
JUDGE

CLARK, SPECIAL

This worker's compensation appeal has been referred to the special worker's compensation appeals panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employee contends that the evidence preponderates against the trial court's finding that his injuries were not caused by a work-related accident. This panel finds that the judgment of the trial court should be affirmed.

Plaintiff Scotty Chism had back surgeries in 1992 and 1993. He was symptom-free for about two years. Plaintiff began working at the Mall of Memphis in 1994. In early August 1995, while lifting sheetrock, plaintiff twisted his back. He noticed that his heel was numb and that he had pain down his left leg. He left work and did not return for the next week. Plaintiff was first seen by Dr. Summers, who referred him to Dr. Gary L. Kellett. Dr. Kellett ordered an MRI and complete bed rest for one week. The MRI

showed post-operative fibrosis at L-4 on the left, with minimal disc bulging at L-5 on the left. After receiving the results of this MRI, Dr. Kellett arranged for plaintiff to have an epidural steroid block and start a work hardening regimen. Plaintiff continued to report to Dr. Kellett during August. He did not pursue physical therapy because of a conflict with persons at the center.

On August 31, 1995, Dr. Kellett advised plaintiff that there was no evidence of a ruptured disc, only some slight bulging. He opined that the best course of treatment was conservative treatment. He also agreed to set up physical therapy at another location. Dr. Kellett released plaintiff to return to light-duty work, with no lifting over twenty-five (25) pounds for two weeks.

Plaintiff returned to full-duty work on September 18. He resigned two months later because he was not given a promised raise and because he felt he was being harassed for tardiness and "piddly" things. He experienced some pain as the nerve block wore off, but continued to work as a painter. He never missed work because of the pain.

Plaintiff did not return to Dr. Kellett again until late January 1996. He reported experiencing a sharp new pain while bending over to pick up his baby's pacifier. At that time a myelogram

showed a ruptured disc at L-5 on the left. Plaintiff now contends that the rupture was a result of the August 1995 injury.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

The burden to establish each element of a workers' compensation claim is upon the employee claiming benefits. Oster v. Yates, 845 S.W.2d 215 (Tenn. 1992). One of these elements is establishing that an injury occurred during employment. Smith v. Empire Pencil Company, 781 S.W.2d 833 (Tenn. 1989). Another requires medical proof of causation. Tindall v. Waring Park Association, 725 S.W.2d 935 (Tenn. 1987).

Dr. Kellett, the treating physician, testified that plaintiff suffered no permanent physical impairment as a result of his August 1995 injury. He was returned to work on August 31, 1995. Dr. Kellett was able only to say that the August 1995 injury "probably did have something to do" with the ruptured disc identified in January 1996. He could not express an opinion about

causation with a reasonable degree of medical certainty. Plaintiff himself admitted he did not experience significant problems until the pacifier incident in January 1996. Only Dr. Joseph C. Boals, to whom plaintiff was sent by his attorney for an independent medical examination in September 1996, offered an opinion that the bulging disc was causally related to the August 1995 injury. The trial court found that plaintiff had not carried his burden of proof in establishing that the bulging disc identified after the January 1996 injury was causally related to the August 1995 work-related accident.

We have reviewed the record in this case, and conclude that the evidence does not preponderate against the trial court's findings. Accordingly, the judgment of the trial court is affirmed. Costs on appeal are taxed to plaintiff/appellant.

J U D G E

CORNELIA A. CLARK, SPECIAL

C O N C U R :

JANICE M. HOLDER, JUSTICE

H E W L I T T P . T O M L I N , J R . , S E N I O R J U D G E

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

SCOTTY DOYLE CHISM,
CHANCERY

) SHELBY

Plaintiff/Appellant,

) NO. 107170-3 R.D.

) Hon. D.J.

A lis and ratos,

vs.

) Chancellor

)

URBAN RETAIL MANAGEMENT COMPANY,) NO. 02S01-9705-CH-
00040

d/b/a MALL OF MEMPHIS and HOME
INSURANCE COMPANY,

)

)

Defendants/Appellees.

) AFFIRMED.

F IL ED

November 24, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact

and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Plaintiff/Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 24th day of November, 1997.

PER CURIAM

(Holder, J., not participating)